BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASMINE R. GADDY		
Claimant	)	
VS.	)	
	)	
GOLDEN CORRAL	)	
Respondent	)	Docket No. 1,052,507
AND	)	
	)	
TRUCK INSURANCE EXCHANGE	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the March 27, 2013, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery. James B. Biggs of Topeka, Kansas, appeared for claimant. Lyndsay E. Spiking of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 18, 2012, preliminary hearing and exhibits thereto; the January 28, 2013, Independent Medical Evaluation Report by Dr. Vito J. Carabetta filed with the Division of Workers Compensation (Division) on January 31, 2013; the March 15, 2013, report of Dr. Vito J. Carabetta filed with the Division on March 25, 2013; and all pleadings contained in the administrative file.

ISSUES

Respondent admits claimant's work activities with respondent resulted in mild left carpal tunnel syndrome and moderate right carpal tunnel syndrome. However, respondent denies that claimant's left ulnar nerve condition arose out of and in the course of her employment with respondent or was the natural and probable consequence of claimant's carpal tunnel syndrome.

Claimant alleges that her left cubital tunnel syndrome was the direct result of her work activities at respondent. Specifically, claimant alleges that after her right carpal tunnel

release and physical therapy, she was unable to use her right hand. That, in turn, forced claimant to put additional strain on her left hand, resulting in left cubital tunnel syndrome.

ALJ Avery inferred that claimant's left ulnar nerve condition (cubital tunnel syndrome) arose out of and in the course of her employment with respondent by ordering medical treatment with Dr. Lynn D. Ketchum for evaluation and possible treatment of claimant's ulnar symptoms.

1. Did claimant's left cubital tunnel syndrome arise out of and in the course of her employment with respondent?

2. If so, did ALJ Avery exceed his authority by appointing Dr. Ketchum as the authorized treating physician?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In March 2009, claimant was employed in the bakery of respondent, making cakes, dinner rolls and pizza dough. This involved a variety of repetitive tasks using her upper extremities, including rolling, kneading and lifting the dough. Claimant would also lift pans of dinner rolls into and out of the oven. Claimant had a gradual onset of tingling and numbness in both hands, with the right hand being worse. Claimant discussed her symptoms with general manager Mr. Geib, who pulled claimant from her bakery duties and placed her on the cash register. Claimant first noticed the symptoms about two months before respondent sent claimant to see Dr. Donald T. Mead on March 21, 2009.

Dr. Mead prescribed physical therapy, which helped some. Claimant, on a referral by Dr. Mead, underwent a nerve conduction test by Dr. Zhengyu Hu on April 28, 2009. The results were abnormal and suggested mild left carpal tunnel syndrome and moderate right carpal tunnel syndrome. Dr. Hu's report stated there was no evidence to suggest ulnar entrapment neuropathy, brachial plexopathy or cervical radiculopathy on either side.

Claimant continued to work, but her symptoms worsened. Dr. Mead referred claimant to Dr. Richard E. Polly, who saw claimant on June 3, 2009. Claimant complained of numbness in both hands. Initially, Dr. Polly recommended additional physical therapy and indicated claimant should avoid things like kneading dough. On October 9, 2009, Dr. Polly performed a right carpal tunnel release on claimant. Dr. Polly saw claimant again on October 19 and November 30, 2009, and May 13, 2010, but his notes from those visits do not mention that claimant had left ulnar nerve issues.

Claimant returned to light duty on October 19, 2009, and full duty on November 10, 2009. Claimant testified that when she returned to work, she ran the cash register and

waited on a small section of tables. According to claimant, the first ten days after she returned to work, she was restricted to lifting no more than five pounds. During those ten days, claimant would use her left hand to perform work tasks. After the initial ten days, claimant continued to use primarily her left hand. She would clear tables by placing dishes in a bucket that weighed up to 20-25 pounds when full. Claimant would carry the bucket with her left hand and place her right hand under the bottom of the bucket. At the preliminary hearing, claimant testified that the problems she had with her left hand or arm are the same as when she worked for respondent.

At some point after her surgery, claimant began working only two days a week for respondent. She got a second part-time job at a gas station for Crescent Oil across the street from respondent. In January 2010, claimant was dropped from respondent's work schedule and began working full time for Crescent Oil. Claimant's job duties were to run the cash register, take out trash, sweep, mop, front and face shelves and stock the cooler. Crescent Oil was bought by Sunshine Oil, and claimant continued to work at the gas station, performing the same job duties.

On June 27, 2011, claimant went to work for Casey's General Store, performing duties similar to those at Sunshine Oil. She also made donuts once or twice a week. Claimant testified her job duties at Casey's General Store were not as repetitive as when she worked for respondent.

Respondent requested Dr. John H. Gilbert to provide a functional impairment rating. In his June 2, 2010, report, Dr. Gilbert indicated he had reviewed the records of Drs. Mead and Polly and that claimant had reached maximum medical improvement by March 21, 2010. Dr. Gilbert's impression was that claimant had right carpal tunnel syndrome with a good result from a right carpal tunnel release. Using the *Guides*,[1] Dr. Gilbert opined claimant had a 2% right upper extremity impairment.

Claimant, at the request of her attorney, was evaluated by Dr. Lynn D. Ketchum on October 26, 2010. Claimant complained of pain in both wrists and numbness and tingling in the ulnar three digits of the right hand. Dr. Ketchum indicated claimant gave a history of sleeping with her elbows bent greater than 90 degrees, which Dr. Ketchum thought contributed to a stretch neuropathy of claimant's ulnar nerves, producing paresthesias in the ulnar three digits. Dr. Ketchum also opined claimant's carpal tunnel syndrome and thoracic outlet syndrome were caused by and certainly aggravated by the highly repetitive work she performed at respondent.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Gilbert, at respondent's request, evaluated claimant a second time on July 27, 2011. Dr. Gilbert noted claimant's right grip strength had diminished, but did not change his opinions on diagnosis or functional impairment.

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic on September 6, 2011. He opined that as a result of claimant's repetitive minor trauma as a baker for respondent, claimant sustained trauma to her cervical spine and upper extremities. Dr. Prostic indicated claimant continues to have ulnar nerve entrapment bilaterally, more at the elbows and wrist than at the thoracic outlet. He recommended claimant have repeat EMGs. He gave claimant a 20% permanent partial impairment of each upper extremity for bilateral median and ulnar nerve entrapment at multiple locations.

Claimant, again at the request of respondent, saw Dr. Gilbert on April 6, 2012. In a letter to respondent's attorney dated April 25, 2012, Dr. Gilbert indicated that when he examined claimant on June 2, 2010, claimant showed no evidence of ulnar nerve compression and showed good ulnar nerve function. He then opined that because claimant was no longer working for respondent on June 2, 2010, if claimant had ulnar nerve entrapment, it was not causally related to her activities at respondent.

Following the preliminary hearing, ALJ Avery ordered claimant to undergo an independent medical evaluation by Dr. Vito J. Carabetta. Dr. Carabetta was asked to render an opinion regarding what, if any, additional medical care is necessary to cure and relieve the effects of a series of accidental injures dated March 21, 2009, to claimant's left upper extremity. Dr. Carabetta examined claimant on January 28, 2013, and indicated there was a possibility of ulnar nerve involvement. He noted that claimant complained of tingling numbness in the third through fifth digits of the left hand and variable, aching pain in her left wrist.

On March 15, 2013, Dr. Carabetta conducted nerve conduction tests on claimant's left median and ulnar nerves. His impressions were a somewhat abnormal electrodiagnostic study that showed some degree of cubital tunnel syndrome, with no other abnormalities. There was no presence of carpal tunnel syndrome. Dr. Carabetta did not opine whether claimant's work activities at respondent caused or aggravated claimant's cubital tunnel syndrome. A physical examination of claimant showed upper extremity range of motion to be normal and there was no apparent muscle atrophy found. Sensory function was grossly intact and manual muscle testing revealed 5/5 strength. The Phalen's test was noted as oddly creating ulnar nerve distribution symptoms. The Tinel's sign was negative. The elbow flexion test was positive on the left side. Dr. Carabetta noted that clinically, cubital tunnel syndrome tends to underreport and generally is worse than what the electrodiagnostic studies show.

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[2] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[3] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[4] The primary issue is, did claimant prove by a preponderance of the evidence that her left cubital tunnel syndrome arose out of and in the course of her employment?

In 2010, Dr. Ketchum indicated claimant's sleep habits contributed to a stretch neuropathy of her ulnar nerves. However, claimant's complaints were limited to both wrists and the right ulnar three digits. Dr. Ketchum indicated claimant had a negative Tinel's sign at the wrists and elbows. Claimant's medical expert, Dr. Prostic, opined claimant sustained trauma to her cervical spine and upper extremities as a result of her repetitive minor trauma as a baker for respondent, while Dr. Gilbert, the medical expert employed by respondent, opined claimant's cubital tunnel syndrome, if any, was not causally related to claimant's work activities at respondent. Both Drs. Prostic and Ketchum were aware claimant was no longer working for respondent. However, they either minimized or were unaware that the jobs claimant held after working for respondent required use of her hands.

Dr. Carabetta, the neutral physician appointed by the ALJ to independently evaluate claimant, was not asked, nor did he render an opinion on causation of claimant's cubital tunnel syndrome. Further complicating matters is the fact that claimant's first nerve conduction studies on the left upper extremity were conducted in April 2009, showing no ulnar nerve issues and another was not conducted until March 2013, showing some degree of cubital tunnel syndrome. During the intervening period, claimant left her job with respondent and worked for two additional employers. Claimant testified that when she worked for respondent after the right carpal tunnel release, her left hand worsened from work activities. She then indicated her current left hand or arm symptoms were the same as when she left respondent's employment.

Claimant consistently complained of pain in both wrists and complained to Dr. Ketchum of numbness in three digits on her right hand. The first mention of any left ulnar nerve issues in any of the medical records was in Dr. Prostic's September 2011 report. It was not until 2013 that it was established through the nerve conduction studies

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[2] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

conducted by Dr. Carabetta that claimant had cubital tunnel syndrome. By that time claimant had worked at two different jobs that required extensive use of her upper extremities. Although Dr. Carabetta did not directly address causation, he did not opine that claimant's work activities at respondent caused, contributed to or aggravated claimant's cubital tunnel syndrome. This Board Member finds that claimant failed to prove by a preponderance of the evidence that her left ulnar nerve issues, including cubital tunnel syndrome, arose out of and in the course of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member reverses the March 27, 2013, preliminary hearing Order for Medical Treatment entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of June, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[5] K.S.A. 44-534a.

[6] K.S.A. 2012 Supp. 44-555c(k).